09-6821

No. __-____
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

David Larry NELSON,
Petitioner,

v.

Donal CAMPBELL and
Grantt CULLIVER,
Respondent.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

David Larry Nelson is scheduled to be executed by lethal injection today at 6:00 p.m. Nelson has been on Alabama's death row for more than 20 years. He was sentenced to death for the 1978 murder of Wilson W. Thompson. The murder was made capital because Nelson had "been previously convicted of murder in the first or second degree in the 20 years preceding the crime." Ala. Code § 13A-5-40(a)(10) (1975). Nelson exhausted all of his state and federal court appeals when the Supreme Court of the United States, on March 24, 2003, denied his petition for a writ of certiorari from the decision of the Eleventh Circuit Court of Appeals, affirming the dismissal of his habeas petition. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002), cert. denied, 123 S. Ct. 1573 (2002).

Three days before his scheduled execution date – set by order of the Alabama Supreme Court on September 3, 2003 – Nelson sought to raise a claim that he, by his own admission, has been fully aware of for at least seven weeks. Demonstrated by "attachment 2" to his complaint, Nelson was aware, at least by August 19, 2003, that due to what he characterized as "severely compromised veins," locating a vein in his lower arms, for the purpose of carrying out the execution, might be problematic. At that time, he was additionally aware that the Warden was unwilling to provide the execution protocol or information regarding the "training" of medical personnel who would be involved in the execution.

(Nelson's complaint, attachment 2) Finally, he was informed of the possibility that a "cutdown" procedure might be utilized if a peripheral vein could not be located. (Nelson's complaint, attachment 2)

The Court of Appeals correctly recognized that characterizing the "cut-down" procedure as a possibility is appropriate, because it will only be considered as a last resort. In other words, it will only be utilized if the medical doctor responsible for connecting the direct intravenous line is unable to otherwise locate a suitable peripheral vein. (Opinion of the Court of Appeals at p. 3, n. 2) Contrary to the assertions Nelson has made throughout these proceedings, therefore, it is unlikely that such a procedure will even become necessary.

As is set forth in the Warden's affidavit (attached to the defendant's motion to dismiss), if the physician is unable to locate a vein in Nelson's lower arms or hands, he will attempt to locate the femoral vein in his groin area. If this fails, the physician will attempt to locate a suitable vein in Nelson's neck. Even Nelson's expert indicates that such steps would be appropriate if, in fact, Nelson has no suitable veins in his lower arms. (See second affidavit of Mark Heath, attached to Nelson's reply to the State's motion to dismiss at paragraph 3) (stating that "[b]ased on David Nelson's history of intravenous drug abuse … and the established lack of visible peripheral veins, it is highly likely that the personnel staffing his execution will be required to place a central line in either the femoral

vein (in the groin), the subclavian vein (behind the clavicle or collar bone), or in one of the jugular veins (in the neck) – the internal or external jugular vein"). Additionally, according to Dr. Heath, connecting a direct intravenous line to a patient's neck area is a fairly routine procedure. Specifically, he refers to the "external jugular vein" as "a commonly-used structure for obtaining intravenous access if peripheral access can not be secured." (second affidavit of Mark Heath at paragraph 8) The Court of Appeals correctly pointed out that Nelson has challenged neither of these procedures. (Opinion of the Court of Appeals at p. 3, n.3)

Despite being fully aware of the factual basis for his claim nearly two months before his scheduled execution date, Nelson waited to file his complaint a mere three days ago. His own actions, therefore, significantly undercut his professed motive for filing his complaint – that he wishes only to question the possible use of a procedure which, according to him, is "easily correctable," but is not otherwise seeking to impede his execution or challenge the validity of his sentence. By sitting on his claim for seven weeks and filing in the afternoon three days before his scheduled execution date, Nelson demonstrated that his goal is not to "correct" an "easily correctable" procedure, but to prevent the State of Alabama from carrying out his sentence.

Further support for this conclusion is Nelson's failure to even attempt to raise his claim in state court. Nelson has not exhausted his claim. He never attempted to raise a claim regarding the method of execution in any state court proceedings. For example, despite his complaints that he has not been provided with a protocol or information regarding the medical personnel who will be involved in his execution, Nelson never sought relief in state court to obtain that information. He did not attempt to file a post-conviction petition under the successive petition rule set forth in Rule 32.2 of the Alabama Rules of Criminal Procedure. Under Rule 32.2(e), the state statute of limitations can be overcome by demonstrating the existence of "newly discovered material facts." Nelson could have, moreover, sought to challenge a decision denying the release of information by the Department of Corrections by filing a petition for a writ of certiorari in the Montgomery County Circuit Court. He did none of these things. Again, his actions demonstrate that his purpose is not merely to alter the execution procedures, but rather to prevent the State of Alabama from carrying out his sentence.[1]

Thus, the Court of Appeals correctly recognized that, despite Nelson's

[1] As of approximately 12:00 p.m. central time today, the statement that Nelson has not sought relief in state court is not entirely accurate. At that time, Nelson filed a "motion to stay execution in the Alabama Supreme Court." Nevertheless it is still correct to state that he never raised, in State court, the claim he is raising here. His request in the Alabama Supreme Court relies upon state law, the Constitution of Alabama.

attempt to "artfully" "label[] his claim," *Spivey v. State Board of Pardons and Paroles*, 279 F.3d 1301, 1302, n 1 (11th Cir. 2002), his "prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) "Because Nelson's § 1983 claim was the "functional equivalent" of a second habeas petition and because Nelson did not get … permission to file a second habeas petition prior to filing in the district court as required by 28 U.S.C. § 2244(b)(3)(A), the district court properly dismissed Nelson's § 1983 claim for lack of jurisdiction to entertain the claim." (Opinion of the Court of Appeals at pp. 4-5)

STATEMENT OF THE CASE

A. Facts

A few days prior to January 1, 1978, Nelson and his girlfriend, Linda Vice, traveled from Anniston to Birmingham, Alabama. *Nelson v. State*, 511 So. 2d 225, 228 (Ala. Crim. App. 1986). Nelson was armed with a .38 caliber pistol that belonged to Vice's uncle. *Id.* On the evening of December 31, 1977, Nelson and Vice were in the "Red Dog Saloon" where they met James Dewey Cash, a cab driver. *Nelson*, 511 So. 2d at 232. "Cash was going to a party, and he asked [Nelson] and Vice to go with him. They agreed, and the three of them left in Cash's taxicab, with Cash driving." *Id.* "After driving a few blocks, . . . [Nelson]

pulled out the pistol and told Cash to hand over his money." *Id.* When Nelson tried to take Cash's watch, "Cash grabbed the barrel of the pistol and [Nelson] started firing." *Id.*, at 233. "[O]ne bullet hit Cash in the chest, one hit him in the head, and one hit the window." *Id.* Vice and Nelson got out of the cab, leaving Cash's body at the scene. *Id.*

Later the same evening, Nelson and Vice went to another lounge in Birmingham where they met the victim in this case, Wilson W. Thompson. *Id.* at 229. Nelson introduced Vice to Thompson as his sister and said that he and Vice had no way home. *Id.* "Thompson and Nelson discussed going to Thompson's mobile home in Kimberly, which was twenty to thirty miles from Birmingham, and having an 'orgy.'" *Id.* The three of them left the lounge at approximately 1:30 a.m. in Thompson's automobile, arriving at Thompson's home about thirty minutes later. *Id.*

"After entering the mobile home, Thompson fixed everyone a drink . . . [and] Nelson ordered Vice to remove her clothes." *Nelson*, 511 So. 2d at 229. When Vice expressed reluctance, Nelson took her into the bedroom, where he again told her to "take something off." *Id.* As she removed her blouse, Thompson, who was nude, entered the room and told Vice to take off the rest of her clothing. *Id.* She did so and then, in accordance with Nelson's command, lay down on the bed. *Id.* "Nelson then told Thompson he could have oral sex with Vice [and, just

as Thompson began to do so,] Nelson shot him in the back of the neck at close range with the .38 caliber pistol." *Id.*

"The bullet apparently passed through Thompson's neck and wounded Vice in the upper part of her leg." *Id.* When Vice arose and started screaming, Nelson shot her twice; "one bullet wound[ed] her in the wrist and the other graz[ed] the back of her head." *Id.* Nelson then hit Thompson in the back of the head with the pistol and began to "ransack" the mobile home. *Id.* "Nelson returned to the bedroom and, upon finding Vice alive, displayed his penis and tried to get Vice to perform oral sex upon him." *Id.* When she refused, "Nelson threw a blanket over her and walked out." *Id.*

Vice was able to make her way to a neighboring mobile home where she was let inside and the authorities were called. *Nelson*, 511 So. 2d at 229. She eventually received treatment and survived her gunshot wounds. Thompson, whose nude body was discovered by police lying face down on the bed, was not so fortunate. *Id.* Nelson was subsequently apprehended in Tennessee in possession of Thompson's car and some of Thompson's personal belongings. *Id.* at 230. In addition, he was carrying a .38 caliber pistol that was later determined to be the gun that had fired the bullet found on Thompson's bedroom floor and was matched to a projectile removed from Vice's leg. *Id.*

B. Procedural History

Nelson "was initially indicted for the capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. Ala. Code § 13-11-2(a)(10) (1975)." *Nelson v. State*, 511 So. 2d 225, 227 (Ala. Crim. App. 1986). The two intentional murders alleged in the indictment were that of James Dewey Cash and Wilson W. Thompson. *Id.* Pursuant to an agreement between the State and Nelson, the initial indictment was nol prossed and Nelson instead received two separate capital murder indictments: one for killing James Dewey Cash while robbing him, and the other for killing Wilson W. Thompson after having been convicted of murder in the second degree within the preceding twenty years. *Id.* at 227-28.

Nelson was first convicted of the capital murder of James Dewey Cash and sentenced to death. *Nelson v. State*, 405 So. 2d 392 (Ala. Crim. App. 1980). That conviction and sentence were subsequently reversed on the authority of *Beck v. Alabama*, 447 U.S. 625 (1980). *Nelson v. State*, 405 So. 2d 401 (Ala. 1981). "Nelson was tried again and on November 27, 1982, found guilty of the robbery and murder of Cash. He was sentenced to life imprisonment in the penitentiary. *Nelson*, 452 So. 2d 1367 (Ala. Crim. App.), cert. denied, 452 So. 2d 1367 (Ala. 1984)." *Nelson v. State*, 511 So. 2d 225, 228 n. 1 (Ala. Crim. App. 1986).

The murder for which Nelson is currently under a sentence of death is that of Wilson W. Thompson.[2] "Nelson was first tried for this offense in October 1978, found guilty as charged in the indictment, by jury verdict, and sentenced to death by the trial court." *Id.* at 228. That conviction, however, was reversed by the Alabama Court of Criminal Appeals "on mandate of *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), on remand, 396 So. 2d 645 (Ala. 1981), and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981)." *Nelson v. State*, 405 So. 2d 50 (Ala. Crim. App. 1981).

Nelson's second trial for the murder of Wilson W. Thompson also resulted in a conviction of capital murder. Nelson v. State, 511 So. 2d 225, 228 (Ala. Crim. App. 1986). "After a separate sentencing hearing, and by unanimous decision, the jury fixed his punishment at death. The trial court then held a second sentencing hearing . . . and on April 2, 1982, sentenced Nelson to death, thereby accepting the death penalty as recommended by the jury." Id. Nelson's conviction and sentence were affirmed by both this Court and the Alabama Court of Criminal Appeals. Nelson v. State, 511 So. 2d 225 (Ala. Crim. App. 1986), aff'd, 511 So. 2d 248

[2] As noted, Nelson was convicted of "murder committed by a defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime." The underlying murder was that of Oliver King. See Nelson v. State, 278 So. 2d 734 (Ala. Crim. App. 1973). Nelson's original conviction for the murder of King was reversed and remanded for a new trial. Id. Rather than being retried for the offense, Nelson pleaded guilty and was sentenced to twelve years in the penitentiary. Nelson v. State, 511 So. 2d 225, 228 (Ala. Crim. App. 1986).

(Ala. 1987). A petition for a writ of certiorari was subsequently denied by this Court. *Nelson v. Alabama*, 486 U.S. 1017 (1988).

Following the failure of his direct appeal, Nelson filed, in the Circuit Court of Jefferson County, a petition for relief from conviction and sentence of death pursuant to Temporary Rule 20 of the Alabama Rules of Criminal Procedure.[3] *Nelson v. Nagle*, 995 F.2d 1549, 1552 (11th Cir. 1993). "Judge Pearson denied Nelson's petition, and Nelson and the State entered into an agreement whereby Nelson would forego direct appeal of the rule 20 petition and instead petition the federal courts for a writ of habeas corpus under to 28 U.S.C. § 2254." *Nelson*, 292 F.3d at 1293-94.

Nelson accordingly filed a petition for habeas corpus relief in the United States District Court for the Northern District of Alabama. That court denied the petition as to Nelson's conviction, but granted relief as to his sentence of death. *Nelson v. Nagle*, No. CR-90-PT-26835 (N.D. Ala. Aug. 19, 1991). The Court of Appeals for the Eleventh Circuit affirmed that decision, holding that "the prosecutor's improper use of the *Eberhart [v. State*, 47 Ga. 598 (1873)] quote, suggesting that judicial authority discourages consideration of mercy in capital cases, rendered the sentencing phase of Nelson's trial fundamentally unfair." *Nelson v. Nagle*, 995 F.2d 1549, 1558 (11th Cir. 1993).

[3] Temporary Rule 20 is now Rule 32 of the Alabama Rules of Criminal Procedure.

In accordance with the judgment of the court of appeals and the District Court for the Northern District of Alabama, Nelson's case was presented to a jury for re-sentencing. "The jury returned a recommendation that Nelson receive the death penalty, and Judge Pearson sentenced Nelson to death." *Id. Nelson v. Alabama*, 292 F.3d 1291, 1294 (11th Cir. 2002). The resulting death sentence was subsequently affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme. *Nelson v. State*, 681 So. 2d 257 (Ala. Crim. App. 1996); *In re Nelson*, 681 So. 2d 260, 262 (Ala. 1996).

On October 23, 1996, the Alabama Supreme Court set a December 6, 1996, execution date for Nelson. Subsequently, however, on December 5, 1996, Nelson was granted a temporary stay of that execution on the ground that Nelson's brother was critically ill and in need of a kidney transplant, which Nelson could possibly provide. After it became clear that a transplant was not feasible, the State filed a Motion To Lift Temporary Stay Of Execution And To Reset Execution Date on February 25, 1997. An execution date was set for April 18, 1997.

On April 14, 1997, Nelson filed a Motion for Stay of Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Alabama, challenging his 1996 death sentence. Because the petition raised claims attacking Nelson's 1994 re-sentencing proceedings, which had not been the subject of a previous federal habeas corpus petition, the State did

not oppose a stay of execution and represented this position to the district court. On July 24, 2000, after considering the claims raised by Nelson in the habeas petition, Judge Robert B. Propst entered an order of dismissal and a memorandum opinion denying the relief sought. That determination was subsequently affirmed by the Eleventh Circuit Court of Appeals. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002). On December 11, 2002, Nelson filed a petition for a writ of certiorari in this Court. The petition was denied on March 24, 2002.

On April 4, 2003, the State of Alabama moved the Alabama Supreme Court to set an execution date for Nelson. Shortly thereafter, counsel for the State received a letter from Nelson in which he represented that his attorneys would not respond to the motion or "seek a stay of execution [on his] behalf." (See correspondence from Nelson attached to State's Motion to Dismiss filed in the district court) He additionally requested that any possible steps be taken to insure that an execution date was set expeditiously. (Id.) On September 3, 2003, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

More than two weeks before the issuance of the death warrant, and nearly two months before the execution date, counsel for Nelson expressed concerns to Warden Culliver "about the lethal injection procedure due to the fact that he [Nelson] has severely compromised veins." (See "Attachment 2" to Nelson's complaint). Counsel also relayed an understanding that Warden Culliver would

not provide a "written protocol regarding execution procedures" or any information regarding the personnel who would be carrying out the execution. (Id.) Finally, the possibility of a "cutdown" procedure was discussed between the Warden and counsel for Nelson. (Id.) Thus, despite being fully aware of the basis for the current claim more than seven weeks before the execution date, Nelson waited until three days before his scheduled execution to file his complaint.

In response to the concerns raised, the State had Nelson examined by medical personnel to determine whether he did, in fact, have compromised veins in his lower arms due to extensive intravenous drug use. (See affidavit of Warden Culliver attached to the State's motion to dismiss) Upon discovering that locating a vein in Nelson's lower arms might be problematic, Warden Culliver sought to find medical personnel who could attach a direct intravenous line in another manner. As is reflected in his affidavit, Warden Culliver located a physician who will attach the line, should it become necessary, to a vein located somewhere other than Nelson's lower arms. (Affidavit of Warden Culliver)

Nelson filed his complaint on the afternoon of Monday, October 6, 2003. Nelson's execution is scheduled to take place on October 9, 2003, at 6:00 p.m. central time. Upon receiving the complaint, the district court contacted the parties and set up a conference call for 8:30 a.m. on October 7, 2003. During the proceedings, the State gave notice of its intent to file a motion to dismiss on the

basis of a lack of jurisdiction. That motion was subsequently filed shortly after 12:00 p.m. central time that same day. Nelson filed a response to the motion to dismiss at approximately 3:25 p.m. central time. The district court issued an order granting the State's motion to dismiss shortly after 5:00 p.m.

The district court determined that Nelson's complaint was the "functional equivalent" of an habeas corpus petition and, therefore, was subject "to the limits imposed on successive petitions in 28 U.S.C.A. § 2244." *Nelson v. Campbell*, No. 03-T-1008, opinion at p. 7, citing *Fugate v. Dep't of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2003); *Spivey v. State Bd. Of Pardons and Parole*, 279 F.3d 1301, 1303 (11th Cir. 2002); *Hill v. Hopper*, 112 F.3d 1088, 1088-89 (11th Cir. 1997); *Felker v. Turpin*, 101 F.3d 95, 96 (11th cir. 1996). Thus, the district court held that "[b]ecause Nelson did not first apply to [this Court] for approval to file a second habeas petition, [it] did not have jurisdiction to hear his claim." *Id.* at 10, citing *Fugate*, 301 F.3d at 1288, and *Spivey*, 279 F.3d at 1303.

The Court of Appeals for the Eleventh Circuit affirmed the determination of the district court that Nelson's complaint was due to be dismissed for lack of jurisdiction. More specifically, the Court of Appeals, like the district court, deemed Nelson's complaint the "functional equivalent" of a successive habeas petition. The Court found that "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to

accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) Judge Wilson dissented, stating that "Nelson's request for a stay has no bearing on his conviction or his sentence" and, therefore, his "§ 1983 action should be allowed to proceed." (Opinion of the Court of Appeals at p. 11) Rehearing en banc was subsequently requested and denied.

On the afternoon of his scheduled execution, Nelson filed, in this Court, a petition for a writ certiorari seeking review of the decision of the Court of Appeals. This brief in opposition to that petition follows.

REASONS FOR DENYING THE STAY MOTION AND THE CERTIORARI PETITION

I. The Court of Appeals and the District Court Both Correctly Construed Nelson's § 1983 Complaint as a Successive Petition Subject to The Restrictions of 28 U.S.C. § 2244.

Nelson's complaint, purportedly brought pursuant to 42 U.S.C. § 1983, seeks to obtain relief from this Court "enjoin[ing] and restrain[ing] the defendants from executing him until they take certain measure to minimize the risk of unnecessary pain, suffering and mutilation during the execution process." *Fugate v. Department of Corrections*, 301 F.3d 1287, 1288 (11th Cir.), cert. and motion for stay denied, 536 U.S. 980 (2002). Because this complaint "constitutes the functional equivalent of a second habeas petition, … [this] court lack[s] jurisdiction to consider [Nelson]'s claim because he ha[s] not applied … for

permission to file a successive application." *Id.* at 1288 (internal citations and quotation marks omitted), citing 28 U.S.C. 2244(b)(3)(A). This determination, arrived at by both the district court and the Court of Appeals, is correct. Nelson's petition for a writ of certiorari should, therefore, be denied.

In *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996), the Court of Appeals held that a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim. Similar to Nelson's complaint, the plaintiffs, in *Felker*, challenged the constitutionality of Georgia's method of execution on Eighth Amendment grounds. *Id.* at 96. The Court of Appeals, "[g]uided by *Gomez v. United States District Court*, 503 U.S. 653 (1992), as interpreted by *Lonchar v. Thomas*, 517 U.S. 314 (1996), … conclude[d] that [the] § 1983 claim [was] subject to the procedural requirements for bringing a second or successive habeas claim." *Id.* Thus, on the basis of the decisions of this Court, the Court of Appeals determined that "the district court was without authority to consider [the] request for relief." *Id.*; see also *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) ("As Hill's § 1983 cruel and unusual punishment claim constitutes the 'functional equivalent' of a second habeas petition, the district court was subject to the law applicable to successive habeas petitions."), citing *Felker*, 101 F.3d at 96.

The Court of Appeals for the Eleventh Circuit has reached that same conclusion in a number of other cases. See *Fugate*, *supra*; *Spivey v. State Bd. of*

Pardons and Paroles, 279 F.3d 1301 (11th Cir. 2002); *Gilreath v. State Board of Pardons & Paroles*, 273 F.3d 932 (11th Cir. 2001). For example, as noted by the court below, the facts of *Fugate*, are not distinguishable from those presented here: "The plaintiff in *Fugate* asserted, among other challenges to the State of Georgia's lethal injection procedure, that the use of a 'cut-down' procedure in the absence of a suitable vein violated the Eighth and Fourteenth Amendments." (Opinion of the Court of Appeals at p. 4), citing Compl. For Injunctive Relief and Decl. J., filed Aug. 12, 2002, ¶¶ 24-28, *Fugate v. Dep't of Corrs.*, No. 02-02219-CV-CC (N.D. Ga. Aug. 13, 2002). "In short, [in] both cases, [the plaintiffs] sought to 'enjoin … the defendants from executing [them] *until* they take certain measures to minimize the risk of unnecessary pain.'" (Opinion of the Court of Appeals at p. 6, n. 4) (emphasis in original), quoting *Fugate*, 301 F. 3d at 1288. Following the decision of the Court of Appeals, this Court subsequently denied Fugate's petition for a writ of certiorari and an accompanying motion for a stay of execution. 536 U.S. 930.

Other circuits, have also resolved this issue in a manner consistent with the opinions above. For example, in *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997), the Eighth Circuit Court of Appeals considered a complaint, brought under § 1983, "challenging the constitutionality of death by electrocution in general and, more specifically, the constitutionality of the particular method by which Nebraska allegedly administers the electrical current for electrocutions." The claim was

rejected on the basis that "the district court correctly determined that Williams' current complaint is the functional equivalent of a successive habeas action, regardless of its technical label." *Id.* at 336.

Additionally, in *McQueen v. Patton (In re Sapp)*, 118 F.3d 460 (6th Cir. 1997), the Sixth Circuit Court of Appeals rejected a § 1983 "claim[] that Kentucky's use of electrocution to carry out a death sentence constitutes cruel and unusual punishment." The Court noted that "[a]lthough McQueen claims that he is not challenging the constitutionality of the death penalty itself but only 'a condition of confinement,' we believe that this challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus." *Id.* at 462. The Court "follow[ed] the clear holding of *Gomez*, as endorsed by the Eleventh Circuit, that a challenge to the method of execution, whatever denominated … is to be treated as a habeas petition." *Id.* at 464; see also *Moody v. Rodriguez*, 164 F.3d 893, 894 (5th 1999) (holding that the Court "lack[ed] jurisdiction to consider Moody's § 1983 action, the only purpose of which is to delay his imminent execution").

Contrary to Nelson's claim, there is no true split among the circuits regarding this issue. For example, he relies on *Sullivan v. Dugger*, 721 F.2d 729 (11th Cir. 1983) as an example of conflicting authority. In *Sullivan*, the Court was presented with a claim by telephone apparently hours before a scheduled execution

without input by a state attorney. *Sullivan*, 721 F.2d at 720. The Court, without any apparent consideration of the issue presented here, announced its ruling by telephone that the claim was without merit. *Id.* Nelson also relies on the opinion of the Ninth Circuit in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996). That judgment was, however, subsequently vacated by this Court. 519 U.S. 918 (1996). Nelson has simply not provided a court of appeals decision wherein a petitioner attacking the constitutionality of the method of execution, and seeking to stay that execution, were the court addressed the issue and concluded that a § 1983 action was proper.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that an inmate cannot bring a § 1983 action that would "necessarily imply the invalidity of his conviction or sentence" unless he proves that his "conviction or sentence has already been invalidated." *Id.* at 486-87. Here, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) His complaint was, therefore, properly construed as the "functional equivalent" of a successive habeas petition.[4] "Because [Nelson] failed to apply for

[4] As was pointed out previously, Nelson's contention that he is not seeking a stay for the purpose of impeding his sentence, but out of concern for specific procedures which may be utilized should be viewed with a high degree of skepticism. As noted previously, Nelson, by his

permission to file a second habeas petition as required by 28 U.S.C. § 2244 (b)(3)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, tit. I (1996), the District Court was without authority to consider their request for relief." *Felker*, 101 F.3d at 96.

This conclusion is further supported by the rule of exhaustion. Nelson has not exhausted his claim. He never attempted to raise a claim regarding the method of execution in state court. For example, despite his complaints that he has not been provided with a protocol or information regarding the medical personal who will be involved in his execution, Nelson never went to state court for assistance in obtaining that information.

Although no concession is made that Nelson's claim would have been viable in state court, the point is that Nelson never made the attempt. Under Rule 32.2 of the Alabama Rules of Criminal Procedure, the rule governing post-conviction procedures, a "second or successive petition on different grounds" is permissible if "the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will

own admission, was aware of the full factual basis for his claim a minimum of seven weeks before the scheduled execution date. (See attachment 2 to the complaint) Yet, he waited to file his complaint until a mere three days ago. Such behavior seems inconsistent with Nelson's professed motive of merely questioning the possible use of a procedure which, according to him, is "easily correctable."

result in a miscarriage of justice." Moreover, the state statute of limitations, set forth in Rule 32.2(c), can be overcome by demonstrating the existence of "newly discovered material facts." Rule 32.1(e), Ala. R. Crim. P. Nelson could have, moreover, sought to challenge a decision denying the release of information by the Department of Corrections by filing a petition for a writ of certiorari in the Montgomery County Circuit Court. See *Pinkard v. State*, 2003 WL 1414618, at *1 (Ala. Crim. App. Mar. 21, 2003) (recognizing that "[a] petition for a writ of certiorari is the proper vehicle for challenging the administrative decision of a state agency").

The doctrine of exhaustion "is rooted in considerations of federal-state comity." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). As this Court is well aware, it is extremely significant in the context of the law governing habeas corpus proceedings. "It would wholly frustrate explicit congressional intent to hold that [Nelson] could evade this requirement by the simple expedient of putting a different label on [his] pleadings." *Id.* at 489-90.

Finally, based on the this Court's decision in *Gomez v. United States District Court*, 503 U.S. 653 (1992), Nelson's complaint is due to be dismissed regardless of "[w]hether his claim is framed as a habeas petition or as a § 1983 action." *Id.* at 654. In either case, Nelson seeks an "equitable remedy" and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and

[the petitioner's] obvious attempt at manipulation. ... There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Id.* at 654. This Court "may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*; see also *Lonchar v. Thomas* 517 U.S. 884 (1996) (explaining *Gomez* as holding that the habeas rules do apply to a last minute § 1983 method of execution claim). As noted previously, despite his contention that he does not challenge the validity of his sentence and only wishes to litigate the possible use of a particular procedure, Nelson held his complaint for nearly two months, waiting to spring it upon the State and the courts at the "eleventh hour." The obviously conclusion is that he likely did so to better his chances for obtaining a stay of execution.

In conclusion, it is simply illogical for one to state that a challenge to the procedures which may be necessary to gain venous access is not a challenge to the execution itself. This is a distinction without a difference. In order to carry out Nelson's lawfully imposed sentence via the legally mandated method of lethal injection, the medical personnel must connect a direct intravenous line to Nelson. Challenging the procedures necessary to do so is a challenge to the execution itself. Moreover, as noted previously, the steps to be taken are reasonable and will be conducted by trained medical personnel, including a medical doctor. The sole

basis for Nelson's eleventh hour claim, the "cut-down" procedure, will most likely not even be utilized. As the Court of Appeals correctly noted, "Nelson's prayer to stay his execution directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." (Opinion of the Court of Appeals at p. 6, n. 4) This Court should similarly reject Nelson's attempt to skirt the successive petition rules by placing a § 1983 label on his constitutional challenge to the method of execution.

II. The Claim Set Forth In Nelson's Complaint Is Insufficient To Warrant A Stay Of Execution.

Nelson contends that his execution will violate the Eighth Amendment because state officials will to execute him by connecting an intravenous line in a location other than his lower arms or hands. Although Nelson's request for a stay of execution should be denied because the successive petition rules bar the consideration of his claim. Nelson should also be denied a stay of execution because he has not established "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

As the federal district court correctly noted, "[t]he Eleventh Circuit has held that when a prisoner brings an action under § 1983 that is the 'functional equivalent' of a habeas corpus petition, the § 1983 action is to be treated as a habeas corpus petition and subjected to the limits imposed on successive petitions

in 28 U.S.C. § 2244." *Doc. 14 at 7.* To overcome this bar, Nelson must demonstrate that his claim is based upon a retroactively applicable new rule of constitutional law or that the factual predicate of his claim could not have been previously discovered and that such claim establishes he is not guilty. 28 U.S.C. §§ 2244(b)(2)(B), 2244(b)(2)(B)(i), (ii). Nelson does not attempt to establish either provision. His request for a stay of execution should, therefore, be denied.

Even if Nelson's claim was not barred under the successive petition rules, he has not established the heavy burden for this Court to grant a stay of execution. This Court, in denying a stay of execution presented in a successive petition before the enactment of AEDPA, stated that "[a] stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.'" *Delo v. Stokes*, 495 U.S. 320, 321 (1990), quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In another pre-AEDPA case, the Eleventh Circuit stated that, to grant a stay a execution, a federal court must apply a four-part test: "whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest." *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987). Even if these pre-AEDPA stay cases are applicable, Nelson has not made a substantial showing of the denial of a federal

constitutional right. His request for a stay of execution should, therefore, be denied.

The relevant facts demonstrate that, based upon concerns expressed by Nelson's attorneys, Alabama state officials are prepared to connect an intravenous line in a location other than Nelson's lower arms or hands. Warden Culliver's affidavit states that in late August, Victoria Smith, one of Nelson's attorneys, stated that Nelson's vein structure was poor in his lower arms and hands due to intravenous drug use. *Culliver's affidavit at paragraph 2*. The Warden states that Smith even brought up the possibility of whether Nelson could be executed because she believed it would be difficult to find a vein for the purpose of carrying out the execution by lethal injection. *Id.* Based upon these concerns, the Warden had Nelson examined by a nurse who informed him that it may be difficult to find a vein in Nelson's lower arms or hands to support a direct intravenous line because of Nelson's IV drug use. *Id.*

Because of these facts, the Warden took steps to see that the execution could be carried out by connecting an intravenous line to another part of Nelson's body. *Culliver's affidavit at paragraph 4*. Warden Culliver contacted a physician who has agreed to perform any procedures necessary to connect a direct intravenous line. *Id.* The physician will first attempt to connect a direct intravenous line to the femoral vein located in the groin. *Id.* If this procedure is unsuccessful, the

physician will attempt to attach a direct intravenous line to the jugular vein located in the neck.[5] Even Dr. Heath, who has submitted two affidavits on behalf of Nelson and has testified for other death row inmates on lethal injection issues,[6] states that the jugular vein is "a commonly-used structure for obtaining intravenous access if peripheral access cannot be secured." (*Dr. Heath's Second Affidavit at paragraph 8*) Only if the two previously defined procedures are not successful, will the physician give Nelson a local anesthetic and make a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. *Id.* Thus, the Warden's affidavit demonstrates that state officials reacted to Nelson's attorneys concerns by obtaining a physician to perform any necessary procedures to attach a direct intravenous line.

Nelson apparently believes that it is an Eighth Amendment violation to attach an intravenous line in any location other than Nelson's lower arms or hands. The evidence that accompanied the filings in the lower court, demonstrate that state officials took necessary steps to be able to connect an intravenous line to a place other than Nelson's lower arms or hands. Nelson cannot establish the deprivation of a constitutional right merely because he has compromised the veins

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[5] This vein was mislabeled in the affidavits and some of the previous pleadings as the "carotid vein."

[6] See New York Times, Lethal Injection Drug May Be Deceptive, October 7, 2003. (Referring to Dr. Mark Heath's testimony supporting death row inmate's claim that lethal injection, Tennessee's method of execution, violates the Eight Amendment).

in his lower arms and hands due to his intravenous drug use and other veins have to be accessed to accomplish the execution.

A stay pending disposition of a petition for writ of certiorari should be granted only when there are "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1993). There "must be a reasonable probability that four members of this Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," and "there must be a significant possibility of reversal of the lower court's decision." *Id.* These conditions do not exist. Thompson does not currently have any post-conviction proceeding pending in any court for this Court to review by means of certiorari. Furthermore, the issues that he attempts to raise in his petition are meritless and unworthy of certiorari review. His motion for a stay and his petition for certiorari should therefore be denied.

CONCLUSION

Based upon the preceding legal authority and argument, this Court should deny Nelson's petition for a writ of certiorari and his motion for a stay of execution.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing brief on the attorneys for the petitioner, by facsimile and by placing the same in the United States mail, postage prepaid and properly addressed as follows:

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